

**82-913**

No. 82-

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ALEXANDER L. STEVAS,  
CLERK

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1982

LONG ISLAND UNIVERSITY,

*Petitioner,*

-v.-

DIANA L. SPIRT, *et al.*,

*Respondents.*

**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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## **QUESTION PRESENTED**

Does a retirement plan which provides for equal contributions by and on behalf of similarly situated men and women but pays lower periodic benefits to women under certain retirement options due to the use of separate male and female mortality tables discriminate on the basis of sex in violation of Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e-2000e17 (1976 & Supp. IV 1980))?

## **PARTIES TO THE PROCEEDING**

In addition to the petitioner and respondent listed in the caption, the following are also respondents herein: Teachers Insurance and Annuity Association ("TIAA") (defendant); College Retirement Equities Fund ("CREF") (defendant); Albert B. Lewis in his capacity as Superintendent of Insurance of the State of New York ("Superintendent Lewis") (supplemental defendant); the Equal Employment Opportunity Commission ("EEOC") (intervenor); and the American Association of University Professors ("AAUP") (intervenor).

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Petitioner Long Island University ("LIU") respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 29, 1982, and that said writ encompass the question presented herein. Teachers' Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") filed a Petition for Writ of Certiorari on November 9, 1982 (No. 82-791).\*

In this petition for a writ of certiorari, LIU raises only one of the questions presented for certiorari by TIAA-CREF. There-

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\* TIAA-CREF also filed a Motion for Expedited Consideration of Petition for Certiorari which was denied on November 15, 1982. LIU authorized TIAA-CREF to state in their Motion for Expedited Consideration that LIU is in favor of a grant of certiorari in this case, that it agrees with TIAA-CREF's position that the *Spirit* case should be heard at the same time as *Norris v. Arizona Governing Committee for Tax Deferred Annuities*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-52), and that it wishes to submit its views on certiorari to the Court. (Petitioner TIAA-CREF's Motion for Expedited Consideration at 3.) LIU submits its views on certiorari to the Court herein.

fore, LIU petitions for a writ of certiorari separately from TIAA-CREF, rather than joining in their petition or waiving the right to petition.\*

For the reasons stated herein (*see infra* pp. 13-15), should certiorari be granted, petitioner LIU respectfully requests that this case be set for argument on the same date argument is heard in *Norris* and that an expedited briefing schedule be adopted, if necessary.

## OPINIONS BELOW

The opinion of the Court of Appeals, reported at 29 Fair Empl. Prac. Cas. (BNA) 1599 and 30 Empl. Prac. Dec. (CCH) ¶133,072, appears in the separately bound Appendix filed with the TIAA-CREF Petition (No. 82-791)(1a).\*\* In addition to its Order and Judgment, dated September 17, 1979 (134a), the district court issued five opinions in this case (all of which appear in the TIAA-CREF Appendix): (1) January 23, 1976 (not officially reported)(28a); (2) July 1, 1976 (reported at 416 F. Supp. 1019)(32a); (3-4) August 9 and September 12, 1979 (reported at 475 F. Supp. 1298)(44a); and (5) March 19, 1982 (on limited remand) (reported at 93 F.R.D. 627)(82a).

## JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was filed on September 29, 1982. This petition has been filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1976).

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\* If TIAA-CREF's petition is granted, LIU will address all the issues approved by the Court for the writ.

\*\* Citations herein to material printed in the TIAA-CREF Appendix appear as "a."

## STATUTE INVOLVED

Involved herein is:

(1) Section 703(a)(1) and (2) of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2(a)(1) and (2) (1976), which provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

## STATEMENT OF THE CASE

### Proceedings Below

Respondent Diana L. Spirt ("Spirt"), a tenured professor at LIU, commenced this action in 1974 against TIAA-CREF alleging that the TIAA-CREF retirement system discriminated against women. In an opinion filed on July 1, 1976, the district court denied Spirt's motion for class certification, denied the joint motion of TIAA-CREF for partial summary judgment and granted TIAA-CREF's motion to join LIU as a defendant (84a).

Thereafter, Spirt and TIAA-CREF filed cross motions for summary judgment. LIU adopted a position of neutrality and submitted its rights and interests to the protection of the court

(45a). The district court denied summary judgment to Spirt on her claims under the Fourteenth Amendment and the Civil Rights Acts, 42 U.S.C. §§ 1983 and 1985(3) (1976) (70a, 74a), but granted summary judgment on her claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1976) ("Title VII") (66a). Relying on *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the district court found that the use of separate male and female mortality tables which resulted in the payment of lower periodic benefits to women under certain retirement options violates Title VII. *Id.* It enjoined CREF from using separate male and female tables with respect to the payment of benefits after May 1, 1980 (75a), enjoined LIU from contributing or requiring its employees to contribute to a retirement system that used separate male and female mortality tables, *id.*, and ruled that TIAA was exempt from Title VII under the McCarran-Ferguson Insurance Regulation Act, 15 U.S.C. §§ 1011-1015 (1976) ("McCarran-Ferguson Act") (53a).

All the parties filed notices of appeal from the district court's decision and Judgment. Subsequently, the Court of Appeals for the Second Circuit, pursuant to a stipulation among the parties, ordered that the appeals be withdrawn from active consideration so that the district court could supervise the settlement negotiations which the parties were then conducting (84a). In the course of the settlement negotiations, TIAA-CREF proposed to replace the separate male and female mortality tables with tables that eliminated any sex-based differentiation in the payment of benefits with respect to future contributions to the TIAA-CREF retirement plans. As a result, TIAA-CREF submitted a set of merged-gender mortality tables to Superintendent Lewis, which he approved (Unisex I) (84a-85a). However, the EEOC objected to Unisex I on the grounds that it violated both Title VII and the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1976)(85a). TIAA-CREF then submitted a revised set of merged-gender mortality tables (Unisex II) which were approved by EEOC. Superintendent Lewis rejected Unisex II. *Id.* TIAA-CREF then developed an entirely new plan with respect to future contributions also based on merged gender

tables (Unisex III) which Superintendent Lewis approved, but which the EEOC did not approve. *Id.*

In February, 1981, the district court granted Spirt leave to file a supplemental complaint naming Superintendent Lewis as a defendant. *Id.* Spirt moved for summary judgment against Superintendent Lewis, and TIAA-CREF, *inter alia*, moved to amend the judgment (86a). Both of these motions were denied (131a). Thereafter, the parties prosecuted their appeals to the Second Circuit on an expedited basis. On September 29, 1982, the Second Circuit affirmed the district court's holding as to CREF and LIU, reversed the district court's holding that TIAA was exempt from Title VII under the McCarran-Ferguson Act and enjoined TIAA from paying benefits after May 1, 1980 on the basis of separate male and female mortality tables.

## Facts

Diana L. Spirt is presently employed by LIU as a tenured professor. She has not retired (JA172, JA175).<sup>\*</sup> LIU is a private institution of higher education and employs a faculty which includes both sexes (JA172). As noted above, plaintiff Spirt originally sued only TIAA and CREF. LIU was brought in as a party by motion of TIAA-CREF.

LIU has contributed to the TIAA-CREF retirement system an equal percentage of the salary of all participating employees regardless of sex (JA175). LIU's contributions for similarly situated males and females have been exactly the same.

TIAA is a not-for-profit institution organized in 1918 by the Carnegie Foundation for the Advancement of Teaching (JA172). It was created solely to serve institutions similar to LIU by relieving them of the burden of establishing and administering their own retirement programs. TIAA functions as a service organization, providing retirement and insurance plans for edu-

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<sup>\*</sup> The facts referred to herein, taken mainly from the Stipulation of Facts dated April 21, 1977, are contained in the Joint Appendix filed below. Citations herein to the Joint Appendix appear as "JA..."

cational institutions and their staff members. *Id.* Eligibility is limited to employees of colleges, universities, independent schools and certain other not-for-profit institutions that are engaged primarily in education or research. *Id.* CREF is a not-for-profit corporation created in 1952 as a companion corporation to TIAA and has the same limited eligibility as TIAA (JA172). TIAA and CREF have the same management and act, in effect, as one organization. Participants may allocate funds between them as they choose (JA536).

Over 85% of all private, four-year colleges and universities and over 40% of all public colleges and universities have adopted retirement plans managed by TIAA-CREF (JA173). Over 700,000 persons presently have contracts with TIAA-CREF and over 3,400 institutions have TIAA-CREF retirement plans. (Petitioner TIAA-CREF's Petition for Writ of Certiorari at 4.)

In their booklet, "CREF Units at Work," TIAA-CREF describe their central role in providing retirement benefits to professors and staff of educational institutions:

For more than half a century, *TIAA has been an integral part of higher education*, providing fully funded, fully vested retirement benefits that allow staff members to move from one institution to another without impairing the ownership and accumulation of their retirement annuity funds. (JA536) (emphasis added).

LIU adopted the TIAA-CREF system in 1955 (JA174). There is no written contract between TIAA-CREF and LIU. *Id.* Each participating employee of LIU individually contracts directly with TIAA and/or CREF. *Id.* LIU makes contributions on behalf of such employees and the employees make contributions themselves (JA173-74). Spirt is one of approximately 800 employees of LIU (500 males and 300 females) who have annuity contracts or certificates with TIAA-CREF (JA173). As noted above, with respect to those employees, LIU contributes an equal percentage of each participating employee's salary, regardless of his or her sex (JA175).

Contributions made by or on behalf of an employee of LIU vest immediately (JA175). Each employee has an individual account in which contributions accumulate. *Id.* These accumulations are exactly the same for similarly situated men and women until retirement (JA175, JA178). An important feature of the TIAA-CREF system is its portability (JA176). Once an employee has a vested account, such employee maintains that account whether or not he or she continues in the employ of LIU. *Id.* If the employee goes to another participating university, the combination of university and individual contributions can continue. *Id.* If the employee leaves the teaching profession, the employee can continue voluntary payments into his or her account. *Id.*

On retirement, participants must choose from the various options TIAA-CREF offer (JA177-78, JA255-56). A participant selects a particular option and enters into a contract with TIAA-CREF (JA176-77). LIU and other educational institutions have no control whatsoever over the terms of these contracts (JA174, JA254), the setting of rates or the determination of benefits to be paid (JA180-83). At retirement, all similarly situated employees of LIU, male or female, have identical accumulations in their individual accounts with TIAA-CREF (JA178).

When an employee retires, he or she is not entitled to a lump sum payment of his or her entire accumulated account (JA176), but must choose from the various options TIAA-CREF offer (JA177-78, JA255-56). Lump sum withdrawal is limited to 10%. *Id.* All benefits, other than the 10% lump sum payment, are paid out depending on the mortality tables in use at the time of retirement (JA182). These mortality tables are revised from time to time to reflect the mortality experience of the TIAA-CREF annuitants (JA180-82). At the time of the Stipulation of Facts, TIAA-CREF used separate male and female mortality tables, sometimes referred to as sex-distinct mortality tables, which the court below found was a violation of Title VII. TIAA-CREF stipulated that it would be technically possible to construct a mortality table which would combine mortality statistics relating to both males and females (JA185). The mortality tables used for Unisex I, II and III consist of such combined mortality statistics.

Two general types of options which rely on mortality tables are available to a participant on retirement: (1) a joint or survivor option providing income for the life of the participant and another person designated by the participant, usually a spouse, and (2) a single life option providing income for the participant alone (JA177-78).

According to TIAA-CREF, 60% of the participating male employees choose one of three joint options. TIAA-CREF state that under the two most frequently selected joint options the benefits are equal for similarly situated male and female annuitants. (Affidavit of William C. Greenough, Chairman and Chief Executive Officer of TIAA-CREF, sworn to August 19, 1975, ¶¶16, 17(c), JA256, 257.) The difference between the amounts paid to men and to women in the third type of joint option is small. (Stipulation of Facts ¶30, JA183.) Thus, with respect to 60% of the men there is practically no difference in the periodic payments made to them and those made to similarly situated women who choose the same joint option (JA 183, JA255-57). This is so because the benefit rate is based upon the combined survival probabilities of each couple, irrespective of whether the first annuitant is male or female (JA255-57). In effect, a unisex mortality table is presently being used with respect to these joint options.

Under the single life option, the periodic benefits payable to men and women on retirement are different. However, TIAA-CREF officials have stated that under their current system, "annuities are paid under the single life option at a *slightly* higher periodic rate to men than to women of the same age. . . ." (Affidavit of Thomas G. Walsh, Actuary of TIAA-CREF, sworn to June 8, 1977, ¶9, JA364) (emphasis added). Thus, according to the affidavits of TIAA-CREF officials, presently there is little or no difference in the periodic payments to men and women under the joint or survivor options, which are chosen by 60% of the men, and the difference between men and women under the current single life options is described as slight. The relief ordered by the Second Circuit in *Spirit* will not seriously affect either the periodic benefits payable to men or the financial stability of TIAA-CREF.

## REASONS FOR GRANTING WRIT

### **I. There Is A Direct Conflict Among The Circuits Regarding The Validity Of The Use Of Separate Male And Female Mortality Tables In Computing Unequal Periodic Benefit Payments To Similarly Situated Men And Women In Retirement Plans Covered By Title VII**

Two courts of appeals have recently come to diametrically opposite conclusions concerning TIAA-CREF's use of separate male and female mortality tables under Title VII. Considering almost identical retirement plans in light of this Court's decision in *Manhart*, the Second Circuit in *Spirt* (1a) held the use of separate male and female mortality tables a violation of Title VII, while the Sixth Circuit in *Peters v. Wayne State University*, 476 F. Supp. 1343 (E.D. Mich. 1979), *rev'd*, Nos. 79-1658, 79-1670, 79-1671 (6th Cir. Oct. 14, 1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. Nov. 10, 1982) (No. 82-794)(136a) found no violation of Title VII. Consequently, the Second Circuit has enjoined TIAA-CREF from making any payments after May 1, 1980 based on separate male and female mortality tables and has enjoined LIU from contributing or requiring its employees to contribute to any plan which uses such tables, but Wayne State University and the other educational institutions which have adopted the TIAA-CREF system are not so enjoined.

The First Circuit, in *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978), appears to agree with the Second Circuit that under *Manhart* the TIAA-CREF retirement plan violates Title VII. 589 F. 2d at 1144.

Thus, the Second Circuit applied *Manhart* to the TIAA-CREF plan and found it in violation of Title VII. The Sixth Circuit applied *Manhart* to the TIAA-CREF retirement plan and found no violation of Title VII. The First Circuit applied *Manhart* to the TIAA-CREF plan and ruled that the plan appeared to violate Title VII but to determine liability the Court wanted further development of the record than existed on a motion to dismiss.

Furthermore, the Ninth Circuit, applying *Manhart*, held that the use of separate male and female mortality tables is a violation

of Title VII in different kinds of retirement and deferred compensation plans not involving TIAA-CREF. *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, 671 F.2d 330 (9th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3287 (U.S. Oct. 12, 1982) (No. 82-52); *Retired Public Employees' Association of California v. California*, 677 F.2d 733 (9th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3140 (U.S. Aug. 14, 1982) (No. 82-262). The reasoning of the Ninth Circuit is in accord with the reasoning of the Second Circuit in *Spirt* and conflicts with the reasoning of the Sixth Circuit in *Peters*.

The fundamental issue in these cases is whether a retirement or deferred compensation plan which provides for equal contributions from similarly situated men and women but pays lower periodic benefits to women based on separate male and female mortality tables violates Title VII. *Manhart* involved a plan in which similarly situated men and women contributed unequal amounts and received equal periodic payments. The First, Second and Ninth Circuits concluded that the reasoning in *Manhart* applies with equal force to cases in which equal contributions yield unequal benefit payments. The Sixth Circuit considered the distinction significant and limited the holding in *Manhart* to cases where the women's take-home pay was less than that of the men (143a).

The First, Second and Ninth Circuits held that the use of separate male and female mortality tables discriminates against women as individuals and that such discrimination could not be overcome by the argument of actuarial equality; *viz.* because women as a group live longer than men as a group, they receive equal value even though they are paid lower periodic benefits than men. These courts viewed the use of separate male and female mortality tables as a difference in treatment based solely on sex and hence facially discriminatory. Therefore, the requisite intent was shown and the plaintiffs did not have to prove improper motivation.\* The Sixth Circuit noted that to substan-

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\* Although the district court in *Spirt* ruled that Spirt did not have to prove that TIAA-CREF's facially discriminatory plan was intentionally discriminatory and stated that "business necessity" does not "insulate [a defendant] from what

tiate a claim of employment discrimination under Title VII, a plaintiff must show either disparate treatment or disparate impact (140a). The court concluded that plaintiffs failed to prove disparate treatment because plaintiffs failed to show improper motivation on the part of Wayne State University (141a). The Sixth Circuit also concluded that plaintiffs failed to prove a disparate impact, holding that separate male and female mortality tables did not discriminate against women in violation of Title VII because such tables were based on longevity rather than sex and because women received actuarially equal value as men even though women were paid lower periodic benefits (142a, 144a).

If the Sixth Circuit's application of *Manhart* to the use of separate male and female mortality tables in connection with equal contribution—unequal payment plans is correct, then the injunction imposed on LIU and TIAA-CREF in the *Spirit* case should be lifted.

If the Second, Ninth and First Circuits' application of *Manhart* is correct, then LIU would urge this Court to affirm the Second Circuit's decision and Judgment in its entirety. The subsidiary questions decided in *Spirit* by the Second Circuit are not questions which this Court usually considers.

Specifically, the Second Circuit's ruling on the application of the McCarran-Ferguson Act appears to be eminently correct and is not in conflict with any other circuit. The Sixth Circuit never reached this issue.

The Second Circuit's affirmance of the district court's finding of fact that TIAA-CREF was an employer for the purposes of Title VII also was correct. While the Sixth Circuit came to an opposite conclusion (139a), that finding was not necessary for the decision in the *Peters* case. Having found that the use of separate male and female mortality tables was not a violation of Title VII, the Sixth Circuit was not required to reach the em-

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would otherwise be a Title VII violation," the court went on to find that the "sex distinctions drawn by TIAA-CREF are [not] 'reasonably necessary to the normal operation' of their plans." (64a) (citations omitted).

ployee-employer issue any more than the McCarran-Ferguson issue. In any event, such a question of fact is not usually considered by this Court on a writ of certiorari.

Similarly, the relief ordered by the district court and affirmed and modified by the Second Circuit is entrusted to the discretion of those courts, and that discretion was not abused. The relief ordered by the Second Circuit is consistent with the language of *Manhart* (24a). As shown herein, *supra* p. 8, the present differences between payments to men and payments to women under the TIAA-CREF system are not large. Thus, the relief granted by the district court and modified by the Court of Appeals, equalizing periodic payments, will not have a substantial let alone a devastating effect on TIAA-CREF, rendering the relief ordered an abuse of discretion. The district court carefully avoided awarding retroactive payments or other relief that would increase costs and thereby jeopardize the financial stability of TIAA-CREF plans (75a). Compliance with the district court's order would require recalculations of benefits disbursed from funds already in TIAA-CREF's control (76a) and would not affect the total anticipated obligations of the TIAA-CREF funds (24a). Furthermore, TIAA-CREF stipulated that it was technically possible to construct unisex mortality tables, and, in fact, TIAA-CREF did so with respect to Unisex I, II and III. Superintendent Lewis has approved Unisex I and III, showing that New York State law does not proscribe the use of such tables.

Nor will the Second Circuit's decision and Judgment in this case revolutionize the private insurance industry. There are no claims in this case that private independent insurance companies serving the general public are covered by Title VII. This case involves a unique organization, TIAA-CREF, which is an "integral part of higher education." (*See supra* p. 6.) TIAA-CREF was created and exists to provide retirement benefits to the teachers and staff of educational and research institutions, thereby relieving such institutions from the burden of administering retirement plans. *Only* teachers and staff of such institutions are eligible for TIAA-CREF retirement contracts.

Nevertheless, the issue presented in this petition is of national importance. Over 3,400 institutions and over 700,000

participants are involved in TIAA-CREF retirement plans throughout the country. There are a substantial number of cases pending which involve the TIAA-CREF retirement system itself, and other cases involve the application of *Manhart* to retirement plans which use sex distinct mortality tables and are covered by Title VII.\*

In view of the conflict among the circuits concerning the application of *Manhart*, and the substantial number of pending cases which involve TIAA-CREF's system, the question posed in this petition should be resolved by this Court so that the prevailing confusion and uncertainty respecting retirement plans covered by Title VII may be removed.

## **II. A Decision In *Norris* Will Not Resolve The Conflict Among The Circuits.**

The questions presented in *Norris v. Arizona Governing Committee for Tax Deferred Annuity*, *supra*, do not require a resolution of the fundamental question posed by this petition concerning the validity of separate male and female mortality tables. The petition in *Norris* focusses on the open market exception of *Manhart* and on Tenth Amendment immunities, issues which simply do not exist in this case.

In *Norris*, the State of Arizona made available to its employees a deferred compensation plan under which deferred compensation could be paid out on retirement in one of three ways: (1) a lump sum payment on retirement; (2) periodic payments for a fixed number of months; and (3) life annuities of a type offered to the general public by one of three private, independent insurance companies. Only the third option was challenged and held to be a violation of Title VII since all such annuities were based on separate male and female mortality tables. Arizona contends that its deferred compensation plan falls within

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\* In their Petition for Writ of Certiorari in this case, TIAA-CREF state that ten cases are pending against them in district courts, and note seven cases in addition to the cases mentioned herein which have applied the holding in *Manhart*. (Petitioner TIAA-CREF's Petition for Writ of Certiorari at 13 & n.5.)

the open market exception pronounced in *Manhart* because the plan's participants could elect to receive their deferred compensation in a lump sum and purchase the largest benefit available in the market place.

Another question raised in *Norris* concerns whether the relief ordered by the Ninth Circuit violates the Tenth Amendment, since the Arizona legislature explicitly provided that no contribution was to be made by the state to the deferred compensation plan.

If this Court determines in *Norris* that the open market exception applies, or that the Tenth Amendment bars the relief ordered, it need not reach the issue posed by this petition.

Furthermore, the deferred compensation plan in *Norris* is so different from the TIAA-CREF plan involved herein and in *Peters* that a decision in *Norris* would not resolve the conflict between the Second and Sixth Circuits.

Unlike the participants in the deferred compensation plan in *Norris*, TIAA-CREF participants do not have the option of receiving their accumulated accounts in one lump sum payment on retirement and purchasing the largest benefit available in the open market. TIAA-CREF participants are required to choose from among the options offered by TIAA-CREF. Unlike *Norris*, TIAA-CREF is not a private, independent insurance company offering annuities to the general public. TIAA-CREF was created solely to relieve educational and research institutions from the burden of administering retirement plans, and eligibility is restricted to the teachers and staff of such institutions. Thus, the open market exception has no application to *Spirt* or *Peters*.

Since this Court has granted certiorari in *Norris*, and at least will consider the open market exception pronounced in *Manhart*, it would seem appropriate to hear *Spirt* at the same time\* so that all the issues regarding the application of *Manhart* can be heard and resolved expeditiously. Then, plan administrators

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\* A petition for certiorari has been filed in *Peters* (No. 82-794), and petitioner there has also requested to be heard at the same time as *Norris*.

can operate in compliance with Title VII, and plan participants can feel secure with respect to their prospective retirement benefits.

### CONCLUSION

For the reasons stated above, LIU prays that a writ of certiorari on the question presented herein be granted and that the case be scheduled for argument on the same date argument is heard in *Norris*, pursuant to an expedited briefing schedule, if required.

Dated: November 30, 1982

Respectfully submitted,

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Supreme Court, U.S.  
FILED

DEC 29 1982

ALEXANDER L. STEVAS  
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FOR THE SECOND CIRCUIT**

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**MEMORANDUM FOR RESPONDENT  
FOR DIANA SPIRT**

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## QUESTIONS PRESENTED

1. Does Title VII of the Civil Rights Act of 1964, as construed by this Court in City of Los Angeles, Department of Water & Power v. Manhart, 435 U.S. 702 (1978), prohibit the use of the retirement benefit plans of respondents Teachers Insurance and Annuity Association ("TIAA") and College Retirement Equities Fund ("CREF") which:

(a) were found to be triangular arrangements among plaintiff, LIU and TIAA-CREF;

(b) require plaintiff's participation;

(c) are admitted to be a term and condition of employment and a fringe benefit of plaintiff's compensation;

(d) are jointly funded through

contributions to TIAA-CREF by and on behalf of males and females, which contributions are exactly equal for similarly situated participants;

(e) are administered by TIAA-CREF who make all payments of benefits; and

(f) solely as the result of using sex differentiated group mortality tables, pay a smaller periodic benefit to individual female retirees than to individual male retirees who retire at the same age and are otherwise similarly situated, including having identical accumulated contributions?

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

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No. 82-913

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LONG ISLAND UNIVERSITY,

Petitioner,

v.

DIANA SPIRT, et al.,

Respondents.

---

On Petition for a Writ of Certiorari  
to the United States Court of  
Appeals for the Second Circuit

---

MEMORANDUM FOR RESPONDENT  
DIANA SPIRT

The plaintiff in this action, Diana  
Spirt, respectfully submits that the  
decision below is correct in adhering to

the decision of this Court in City of Los Angeles, Department of Water & Power v. Manhart, 435 U.S. 702 (1978). Plaintiff, however, urges for the reasons herein set forth that the Petition for Writ of Certiorari filed by defendant Long Island University ("LIU") should be granted and the decision below summarily affirmed.

Respondent Spirt heretofore authorized defendants TIAA and CREF to state in their motion, subsequently denied, to the Court for an expedited consideration accompanying their companion Petition for Writ of Certiorari in this action<sup>1</sup> that she had no objection to the granting of the Writ and to the request for argument

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<sup>1</sup> TIAA-CREF filed a Petition for a Writ of Certiorari and their Motion for Expediting Consideration of the Petition on November 9, 1982 (No. 82-791).

to be scheduled on the same date as that in Norris v. Arizona Governing Committee, 671 F.2d 330 (9th Cir. 1982), petition for cert. granted, 52 U.S.L.W. 3276 (U.S., Oct. 12, 1982) (No. 82-52),<sup>2</sup> agreeing principally because of the decision in Peters v. Wayne State University, 476 F. Supp. 1343 (E.D. Mich. 1979), rev'd, Nos. 79-1658, 79-1670, 79-1671 (6th Cir., Oct. 14, 1982), petition for cert. filed 51 U.S.L.W. (U.S., Nov. 10, 1982) (No. 82-794) ("Peters"). The Peters case involves the TIAA-CREF plan, and the decision is in direct conflict with the lower court decision herein.

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<sup>2</sup> The Motion further declared that plaintiff supports the result reached by the Second Circuit and reserves her position on the merits. Motion by Petitioners TIAA-CREF, p. 5. That motion was denied.

## STATEMENT OF THE CASE

The statement of this case in the petition by LIU presents a succinct summary of the case, and only the following undisputed points are added:

1. The plan of TIAA-CREF-LIU ("Plan") with employees, including plaintiff, was found by the lower court to be a tripartite arrangement among TIAA-CREF, LIU and the employee-participants (JA1022)<sup>3</sup> and is admitted to relate to compensation and to be part of the terms, conditions and privileges of plaintiff's employment; it was further admitted to be a fringe benefit to her within the express provisions of the collective bargaining agreement and

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<sup>3</sup> "JA" refers to the Joint Appendix filed in the Second Circuit Court of Appeals.

subject to negotiation with the duly certified collective bargaining unit, United Federation of College Teachers, AFL-CIO, of which plaintiff is a member (JA216-217). TIAA-CREF manages the Plan established at LIU by a detailed resolution of the Board of Trustees as the retirement plan of the university to be fully administered by TIAA-CREF, who also receive all funds and make all payments of benefits (JA188).

2. Actuarial principles are admittedly not offended by a gender neutral mortality table (JA185) ("Unisex Table"), and the failure to use such tables was the key question in Manhart. Whether such tables are to be used is the principal difference between the decision of the lower court in this case and the contrary decision by the

Sixth Circuit Court of Appeals in Peters, supra, permitting the use of sex segregated tables. The conflict presents the only issue appropriate for review and presents a conflict which this Court should resolve. All other issues herein are based on finding of fact (e.g., relationship among parties) or are within the sound discretion of the lower court (e.g., scope of relief) or do not present the special and important reasons for review on a writ of certiorari.

3. Respondent Commissioner of Insurance, State of New York ("Commissioner"), who has the supervisory and regulatory jurisdiction of insurance companies in the insurance and pension business in the State of New York, stated during the proceeding in the

lower court that plans using the Unisex, non-sex differentiated mortality tables do not violate the requirements of the statutes of the State of New York and requirements of equity (JA626), and he formally approved one proposal by TIAA-CREF to use Unisex Tables in connection with the plans at issue (JA452-453). Thus, the use of Unisex Tables comports with all insurance regulatory requirements of the State of New York, including equitable treatment of participants and risk classification.

4. Respondent TIAA-CREF proposed and obtained approval of one Unisex plan from the Commissioner (JA626) and adopted and obtained approval of a variation of that Unisex plan from the Equal Employment Opportunity Commission ("EEOC") (JA614). The use of Unisex

Tables finds no impediment from New York Insurance Law, actuarial principles, insurance concepts or, of course, the EEOC.

5. The TIAA-CREF-LIU Plan is subject to the requirements of the Employees Retirement Income Security Act of 1974, 29 U.S.C. §§1001, et seq.

#### SUMMARY OF ARGUMENT

Memoranda filed by petitioner LIU, by petitioners TIAA-CREF in their companion petition (supra, p. 2, fn. 1), and by intervenor-respondent American Association of University Professors ("AAUP") in this case and by the petitioner and respondent in Peters (supra, p. 3), plus the proceedings to date in this Court in Norris (supra, p. 3), urge a multitude of points orbiting

the question of whether segregated, sex discriminatory mortality tables may be used under the circumstances presented in each case.

Respondent Spirt agrees with petitioner LIU that the sole question appropriate for review by the Court in this action and in Peters is whether the Manhart principles are to be enforced; if so, respondent respectfully submits that those principles are applicable and are the basis for summary affirmance with the consequences which would follow in the Peters case.

## ARGUMENT

But for the conflicting decision by the Sixth Circuit Court of Appeals in the Peters case, an appropriate case for granting of the writ is not presented. The Peters decision applied the group or class analysis approach to the use of sex segregated annuity tables. The approach has been repeatedly described by TIAA-CREF as providing "actuarially equality" between the classes of males and females,<sup>4</sup> that is, by actuarial accounting, the total pay-out of benefits for each group over several decades and after the last of each group is deceased, will be equal when the total paid-in for each group was equal.

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<sup>4</sup> See, Petition for Writ of Certiorari of TIAA-CREF in this action, fn. 1, supra, p. 2 at p. 5. In spite of the Manhart ruling, TIAA-CREF still urge this argument.

Manhart rejected the "actuarial equality" approach urged by TIAA-CREF. In doing so, this Court made the following rulings or findings relating to the question presented:

1. Although women as a class may outlive men as a class, "[i]t is equally true. . . that all individuals in the respective classes do not share the characteristic [life expectancy] that differentiates the average class representatives." Manhart, 435 U.S. at 709.

2. "The question. . . is whether the existence or non-existence of 'discrimination' is to be determined by comparison of class characteristics or individual characteristics." Id.

3. In answering the question, the Court noted that Title VII's "focus

on the individual is unambiguous" and that even true generalizations about a class are an insufficient reason to discriminate against an individual.

Id.

4. Women as a class, to some extent, may be subsidized by men as a class. But, "the question of fairness to various classes affected by the statute [Title VII] is essentially a matter of policy for" Congress which "has decided that classifications based on sex, like those based on national origin or race, are unlawful." Id., at 710.

5. As to the insurance equity and risk points emphasized by TIAA-CREF in Manhart<sup>5</sup> and again here, the Court noted

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<sup>5</sup> TIAA-CREF appeared as amici curiae in Manhart.

that "when insurance risks are grouped, the better risks always subsidize the poorer risks." The treatment of "different classes or risks as though they were the same is a common practice which has never been considered inherently unfair." To insure the flabby and fit as equivalent risks may be more common than treating males and females alike but "nothing more than 'habit' makes one 'subsidy' seem less unfair than the other." Id., at 711.

6. "Even if the statutory language [of Title VII] were less clear, the basic policy of the statute requires that we focus on the fairness to the individual rather than fairness to classes." Id., at 710.

7. Classifications by religion, race or sex tend improperly to preserve

traditional, or stereotyped, assumptions about groups rather than thoughtful scrutiny of individuals, and the Court expressly commented that generalizations of the separate mortality tables illustrate the point. Id.

8. No special definition of discrimination is used for groups, or classifications, for insurance groupings. No one can predict an individual's life span but this point is no different from other individually unpredictable events in many employment or management decisions. Id., at 711.

9. "Individual risks, like individual performance, may not be predicted by resort to classifications proscribed by Title VII". Id., at 711.

10. The practice of the separate tables does not pass even the simplest

test, and it is sex discrimination. One cannot say that the differentiation is not based entirely on sex. " 'Sex is exactly what it [the discrimination] is based on' . . .", quoting Judge Dunaway from the Court of Appeals opinion. Id., at 713-714. The argument that the different treatment of males and females was based on longevity rather than sex was stated to be specious. Id., fn. 24 at 714.

What this Court found in Manhart to be a specious argument was nonetheless applied in Peters, and each of the foregoing points was ignored.

Since the application of Manhart is the only issue as to which a Writ of Certiorari is appropriate, the most expeditious way to dispose of the conflict between this action and the Peters action

is to grant the petition of LIU and,  
assuming Manhart is held by this Court to  
govern, summarily to affirm the decision  
of the Second Circuit Court of Appeals.

CONCLUSION

Respondent-plaintiff Spirt  
respectfully suggests that the Writ of  
Certiorari in this action be granted,  
that the question accepted is that stated  
herein and that upon granting such Writ  
that the decision of the lower court be  
affirmed.

Dated: December 27, 1982

Respectfully submitted,

KENNETH D. WALLACE  
(Counsel of Record)  
Attorney for Respondent  
Diana Spirt

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JAN 3 1983

ALEXANDER L. STEVAS  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

LONG ISLAND UNIVERSITY,

*Petitioner,*

—v.—

DIANA L. SPIRT, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

**RESPONSE OF TEACHERS INSURANCE AND  
ANNUITY ASSOCIATION AND COLLEGE  
RETIREMENT EQUITIES FUND RESPECTING  
CERTIORARI**

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

No. 82-913

---

LONG ISLAND UNIVERSITY,

*Petitioner,*

—v.—

DIANA L. SPIRT, *et al.*,

*Respondents.*

---

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SECOND CIRCUIT

---

**RESPONSE OF TEACHERS INSURANCE AND  
ANNUITY ASSOCIATION AND COLLEGE  
RETIREMENT EQUITIES FUND RESPECTING  
CERTIORARI**

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Respondents Teachers Insurance and Annuity Association and College Retirement Equities Fund ("TIAA-CREF")<sup>1</sup> believe that a Writ of Certiorari should issue to

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<sup>1</sup> Pursuant to Rule 28.1 of this Court, TIAA-CREF state as follows: (1) *Parents*. All of TIAA's capital stock is held by Trustees of TIAA Stock, a not-for-profit, non-stock, New York membership corporation. CREF itself is a not-for-profit, non-stock, New York membership corporation. Seven persons serve both as members of CREF and of Trustees of TIAA Stock. (2) *Non-wholly owned subsidiaries and affiliates*. TIAA owns 50% of the issued and outstanding stock of North Coast Investment Corporation, a Delaware corporation.

review the Judgment and Opinion of the Second Circuit Court of Appeals entered herein on September 29, 1982. *Spirit v. Teachers Insurance and Annuity Association*, 691 F.2d 1054 (2d Cir. 1982). TIAA-CREF have already filed a Petition seeking review of the Second Circuit's decision, 51 U.S.L.W. 3394 (U.S. November 9, 1982) (No. 82-791), and their views respecting the issues raised by that decision are fully set forth therein. Petitioner Long Island University ("LIU") here requests a much more limited review of the Second Circuit's decision than that sought by TIAA-CREF. TIAA-CREF believe the scope of LIU's Petition to be too narrow, and that the questions deserving of review are those set forth in its own Petition for Certiorari.

For example, the Second Circuit's decision respecting the applicability here of the McCarran-Ferguson Act (15 U.S.C. §§ 1011 *et seq.* (1976)) ("the Act")<sup>2</sup> is not a "subsidiary" issue much less an "eminently correct" determination. (LIU Pet. p. 11). As noted in TIAA-CREF's Petition in *Spirit* (pp. 19-21), the Court below has, by its decision on that issue, redefined the clear words of the Act, severely limited its scope, and substituted confusion where clarity formerly existed.

By holding that the words "No act of Congress" in the statute were "primarily" meant to apply to the federal antitrust laws and were not intended to include "subsequently enacted civil rights legislation" (691 F.2d at 1065), the Court has made a wholesale revision of the plain meaning of the Act. Insurers, such as TIAA and CREF,

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2 Section 1012(b) of the Act in pertinent part provides:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance. . . .

can no longer be confident that, once engaged in the business of insurance and acting in accordance with state insurance law, they will not also now be subject to a variety of federal legislation enacted since 1945 which might arguably apply to their insurance activities. Such a major re-writing of the Act should not go unreviewed by this Court.

That the McCarran-Ferguson issue is an important one deserving of review by this Court is also clearly demonstrated by the presence here as a party of Albert B. Lewis, Superintendent of Insurance of the State of New York. Both plaintiff below and the Equal Employment Opportunity Commission have sued Superintendent Lewis by reason of his rejection, as inconsistent with New York law, of a merged-gender ("unisex") mortality table proposed for prospective use by TIAA-CREF. A direct federal-state conflict thus exists over the regulation of the "business of insurance," a conflict which the Act was meant to resolve. The McCarran-Ferguson issue is both important and dispositive and should be examined by this Court, not ignored as LIU suggests.

Further, the question of Title VII's applicability to third-party insurers such as TIAA-CREF, who are neither employers nor agents of employers as required by that statute, is hardly a subsidiary issue or a mere question of fact. (LIU Pet. p. 12). Here, the Second Circuit's decision that TIAA-CREF, though not plaintiff's employer "in any commonly understood sense," 691 F.2d at 1063, were nonetheless subject to Title VII as if they *did* employ their annuitants, presents important questions of statutory construction. TIAA-CREF's contention that they are not here employers within the meaning of Title VII is underscored by this Court's statement in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 718 n. 33 (1978), that "Title VII and the Equal Pay Act

primarily govern relations between employees and their employer, not between employees and third parties." See TIAA-CREF's Petition pp. 16-17.

The Sixth Circuit in *Peters v. Wayne State University*, 691 F.2d 235, 238 (1982), *petition for cert. filed*, 51 U.S.L.W. 3394 (U.S. November 10, 1982) (No. 82-794), found the District Court's decision that TIAA-CREF were "employers" to be "clearly erroneous." Far from being "not necessary" (LIU Pet. p. 11) to the *Peters* decision, that holding was compelled by that Court's stated desire to prevent the "revolutioniz[ing of] the insurance and pension industries" which this Court sought to avoid in *Manhart*. *Id.* This issue, too, should be examined by this Court and the conflict between the Second and Sixth Circuits resolved.

Petitioner also argues that the relief granted by the Second Circuit was within its discretion and wholly consistent with *Manhart*'s warnings against the imposition of retroactive relief. TIAA-CREF disagree with both assertions for the reasons stated in their Petition (pp. 17-19). Petitioners, in arguing (Pet. p. 12) that the decision below "would not affect . . . the TIAA-CREF funds," avoid discussing the impact of the relief granted on TIAA-CREF's male constituents. The Second Circuit has ordered that a portion of the benefits due to men, resulting from their past contributions, be given to women in order to equalize periodic benefit rates. This reduction in men's benefits is thus clearly retroactive. The impact of the transfer of males' lifetime benefits to women—in the amount of some \$2 billion—is, contrary to the Second Circuit's decision, 691 F.2d at 1068, a "drastic" award. The question of retroactive relief also merits review by this Court.

Finally, TIAA-CREF agree with Petitioner that a decision in *Arizona Governing Committee, et al. v. Norris*,

*cert. granted*, 51 U.S.L.W. 3287 (U.S. October 12, 1982) (No. 82-52), cannot reasonably be expected to resolve the significant and difficult issues present here, but not in *Norris*. See TIAA-CREF Pet. pp. 11-13. Issues such as an insurer's justification for the use of sex-distinct mortality tables, the proper application in these circumstances of the McCarran-Ferguson Act, and the propriety of the grant of retroactive relief herein should, rather, be briefed, argued, and decided on the basis of the trial court record made below and not left for determination in light of *Norris*' more limited scope.

### **Conclusion**

For all the foregoing reasons, as well as those contained in their own Petition, TIAA-CREF urge this Court to grant certiorari in this action to review the questions presented in TIAA-CREF's previously filed Petition.

Respectfully submitted,

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Nos. 82-791 and 82-913

Supreme Court, U.S.  
FILED

JAN 14 1983

**In the Supreme Court of the United States**  
OCTOBER TERM, 1982

CLERK

**TEACHERS INSURANCE AND ANNUITY ASSOCIATION  
AND COLLEGE RETIREMENT EQUITIES FUND,  
PETITIONERS**

**v.**

**DIANA L. SPIRT, ET AL.**

**LONG ISLAND UNIVERSITY, PETITIONER**

**v.**

**DIANA L. SPIRT, ET AL.**

**ON PETITIONS FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

**BRIEF FOR THE EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION AS RESPONDENT, AND  
FOR THE UNITED STATES AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

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## **QUESTIONS PRESENTED**

1. Whether the use of sex-based actuarial tables to provide unequal pension benefits to male and female retirees violates Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (a)(1).

2. Whether Teachers Insurance and Annuity Association and College Retirement Equities Fund are "employers" within the meaning of Title VII.

3. If TIAA and CREF are employers, whether the McCarran-Ferguson Act precludes the application of Title VII to the retirement plan offered here.

4. Whether the relief mandated by the courts below is appropriate.

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**In the Supreme Court of the United States**

OCTOBER TERM, 1982

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No. 82-791

TEACHERS INSURANCE AND ANNUITY ASSOCIATION  
AND COLLEGE RETIREMENT EQUITIES FUND,  
PETITIONERS

*v.*

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**BRIEF FOR THE EQUAL EMPLOYMENT  
OPPORTUNITY COMMISSION AS RESPONDENT, AND  
FOR THE UNITED STATES AS AMICUS CURIAE  
IN SUPPORT OF RESPONDENTS**

---

**OPINIONS BELOW**

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 691 F.2d 1054. The district

court's opinion of July 1, 1976 (Pet. App. 32a-43a) is reported at 416 F. Supp. 1019; its opinions of August 9 and September 12, 1979 (Pet. App. 44a-81a) are reported at 475 F. Supp. 1298; its opinion of March 19, 1982 (Pet. App. 82a-131a) is reported at 93 F.R.D. 627; and its opinion of January 23, 1976 (Pet. App. 28a-31a) is unreported.

### **JURISDICTION**

The judgment of the court of appeals was entered on September 29, 1982 (Pet. App. 132a). The petition for a writ of certiorari in No. 82-791 was filed on November 9, 1982, and in No. 82-913 on November 30, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **STATUTES INVOLVED**

Section 701(b) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b), provides in pertinent part:

The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees \* \* \* and any agent of such a person \* \* \*.

Section 703(a)(1) of Title VII of that Act, 42 U.S.C. 2000e-2(a)(1), provides in pertinent part:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin \* \* \*.

Section 2(b) of the McCarran-Ferguson Act, 15 U.S.C. 1012(b), provides in pertinent part:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance \* \* \*.

Section 204(g) of Title I of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1054(g), provides that:

The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c) (8) of this title.

Section 411(d) (6) of the Internal Revenue Code of 1954 (26 U.S.C. (Supp. V) ) provides that:

A plan shall be treated as not satisfying the requirement of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c) (8), or section 4281 of the Employee Retirement Income Security Act of 1974.

### STATEMENT

1. Respondent Diana L. Spirt, a tenured professor at Long Island University (LIU), a private educational institution, brought this action alleging that the use by Teachers Insurance and Annuity Association (TIAA) and College Retirement Equities Fund (CREF) of sex-segregated mortality tables which result in the payment to women of lower monthly retirement benefits than are paid to similarly situated men, violated Title VII of the Civil Rights Act of

1964, as amended (42 U.S.C. 2000e *et seq.*).<sup>1</sup> The Equal Employment Opportunity Commission (EEOC) intervened in this case on March 19, 1982 (Pet. App. 96a).

TIAA and CREF are non-profit organizations incorporated in the State of New York that provide retirement and insurance plans for the employees of educational institutions, including Long Island University (Pet. App. 3a, 45a). Participation in TIAA and CREF plans is limited to colleges, universities, independent schools and other nonprofit educational or research institutions (Pet. App. 45a). TIAA, which was organized in 1918 by the Carnegie Foundation for the Advancement of Teaching, offers what are in form fixed annuities for retirement plan participants. Its companion corporation, CREF, was established in 1952 to permit investment in common stock; CREF offers plan participants variable annuities (Pet. App. 3a-5a). By 1977, more than 85% of all private, four-year colleges and universities and more than 40% of all public colleges and universities had adopted retirement plans managed by TIAA-CREF (Pet. App. 3a). At that time, more than 400,000 employees of approximately 2,800 participating institutions were covered by the TIAA-CREF system (Pet. App. 3a).

Educational institution participation in the TIAA-CREF system is "normally established by a resolu-

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<sup>1</sup> The complaint also alleged that TIAA-CREF's use of sex-segregated tables violated the equal pay provision of the Fair Labor Standards Act, as amended in 1963, 29 U.S.C. 206(d), and the Equal Protection Clause of the Fourteenth Amendment (Pet. App. 33a). However, only Title VII issues are presented in this Court.

tion of the board of trustees" (J.A. 173).<sup>2</sup> In 1975, the trustees of Long Island University passed a resolution adopting the TIAA and CREF plan at issue here and establishing the conditions under which university employees would participate in the plan (J.A. 188-191). In addition, the resolution provides that, subject to the understanding that accrued benefits will not be affected, the "Board of Trustees of the University [re]serves the right to modify or discontinue the plan at any time" (J.A. 192).

Under that resolution, tenured faculty members such as respondent Spirt must participate in the LIU plan (Pet. App. 3a). The resolution also provided that each employee would contribute 5% of his salary to the plan and that the University would contribute an additional sum in the amount of 5% of the first \$4,800 of an employee's yearly salary and 11% of yearly earnings in excess of \$4,800 (Pet. App. 4a).

The university forwards all contributions, including those paid by participating employees, to TIAA and CREF (Pet. App. 4a). Each contribution made by or on behalf of an employee is credited to an individual account; each participating employee holds an individual contract with TIAA-CREF (J.A. 174-175). Although TIAA and CREF operate differently, both use mortality tables classified by sex in calculating plan benefits, because women as a class live longer than men as a class (Pet. App. 5a).<sup>3</sup> Be-

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<sup>2</sup> "J.A." refers to the joint appendix filed with the court of appeals.

<sup>3</sup> TIAA provides a fixed minimum annuity that is determined by applying a guaranteed interest rate to the contributions set aside in an "accumulation" for each participant, then converting this accumulation plus added "dividends" to a life annuity on the basis of this amount. Each contribution

cause benefits are calculated on the basis of sex-segregated tables, "female participants in the plans receive smaller monthly [retirement] payments than male participants of the same age, years in the plans, salary, and rate of contribution" (Pet. App. 46a).

2. After denying a motion for class certification, the district court granted summary judgment in favor of respondent Spirt. Applying this Court's decision in *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702 (1978), the district court held that Long Island University and CREF had violated Title VII by using sex-segregated mortality tables that resulted in payment of lower monthly retirement benefits to women than to similarly situated men (Pet. App. 58a-60a).<sup>4</sup> The court found that Long Island University and other educational institutions have "delegated their responsibility for and control over employee annuity plans to TIAA

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also provides entitlement to a specified sum as part of a minimum guaranteed annuity benefit. That sum is determined on the basis of sex-segregated rate schedules incorporated in the contract. TIAA reserves the right to substitute a different rate schedule, which may only apply to premiums collected after its adoption (Pet. App. 76a n.28; J.A. 174, 194, 197).

The CREF portion of the plan provides for a variable annuity (Pet. App. 5a). During a participant's career, CREF contributions are applied to the purchase of "accumulation units" representing an interest in CREF's investment portfolio. At retirement, accumulation units are converted into "annuity units," which are computed on the basis of sex-segregated mortality tables. The actual benefits received by retired participants vary with the market value of the CREF portfolio (Pet. App. 74a-75a).

<sup>4</sup> Finding no state action, the district court ruled against respondent Spirt on her constitutional claims. It did not reach her Equal Pay Act allegations (Pet. App. 3a).

and CREF" and, hence, TIAA and CREF are employers within the meaning of Title VII (Pet. App. 61a-62a). The court also held (Pet. App. 46a-53a) that TIAA (but not CREF) was in the "business of insurance" and, hence, insulated from Title VII liability by the McCarran-Ferguson Act, 15 U.S.C. 1011 *et seq.*, which provides that "[n]o Act of Congress shall be construed to invalidate \* \* \* any law enacted by any State for the purpose of regulating the business of insurance" (*id.* at 1012(b)) unless the federal act specifically so states. Because CREF was not insulated from Title VII liability, in September 1979 the court enjoined CREF from using sex-segregated mortality tables in calculating annuity benefits for persons who retire on and after May 1, 1980 (Pet. App. 134a-135a). The court also enjoined Long Island University from contributing to, or requiring its employees to contribute to, on and after July 1, 1980, any retirement program that uses sex-segregated mortality tables in calculating periodic benefits for persons who retire after that date (*ibid.*).<sup>5</sup>

After the district court entered its judgment, all parties filed notices of appeal; the appeals were withdrawn from active consideration while settlement negotiations were conducted (Pet. App. 8a, 84a-85a). In the course of those negotiations, petitioners proposed several rate schedules that did not differentiate

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<sup>5</sup> By a series of stipulated orders, the defendants' compliance with the injunctive provisions of the district court's orders and judgment has been stayed pending appeals. The stipulated order of March 29, 1982, provides that if the judgment is affirmed, "the rights of all parties shall be determined as if the injunctive provisions \* \* \* had been in full force and effect at all times since May 1, 1980 as to CREF and June 1, 1980 as to LIU."

between men and women, but failed to propose a rate schedule satisfactory both to EEOC and the New York State Superintendent of Insurance (*ibid.*). When settlement efforts proved unsuccessful, the court of appeals, in February 1981, ordered a limited remand to the district court to consider petitioners' objections to the relief ordered. Respondent EEOC thereupon moved to intervene as a party plaintiff (Pet. App. 8a-9a, 85a-86a).<sup>9</sup> The district court granted that motion as to the pending relief orders in March 1982, in an opinion that also rejected petitioners' objections to the relief ordered (Pet. App. 95a-96a, 125a-130a). Amended notices of appeal were filed in April 1982 (Pet. App. 9a).

On appeal, the court of appeals held that the use of sex distinct mortality tables violates Title VII (Pet. App. 14a); it agreed with the district court that there is "no meaningful distinction between the disparate treatment accorded the female employees in *Manhart*, \* \* \* and the disparate treatment accorded the female TIAA-CREF participants in this case" (Pet. App. 10a). The court affirmed the ruling of the district court that TIAA-CREF are "employers", as defined in Section 701(b) of Title VII (42 U.S.C. 2000e(b)), since in the court of appeals' view that term was intended to "encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' \* \* \* [as] defined at common law" (Pet. App. 14a). TIAA-CREF fell within the Title VII definition of employer, in the

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<sup>9</sup> EEOC also instituted suit against the New York State Superintendent of Insurance, and moved to consolidate that action with this one (Pet. App. 86a). That motion was denied (Pet. App. 96a-98a).

court's view, because TIAA-CREF exist solely for the purpose of enabling employer universities to delegate their responsibilities to provide retirement benefits for their employees, and are "so closely intertwined with those universities" (*ibid.*). The court also found it relevant that participation in the Long Island University plan was mandatory for tenured faculty, and that the university shares in the administrative responsibilities associated with faculty members' participation in the plan (*ibid.*).

The court of appeals affirmed the district court's holding that CREF, as a variable annuity company, was not in the business of insurance within the meaning of the McCarran-Ferguson Act. However, it reversed the district court's holding as to TIAA, finding that "the historical context, the legislative history, and judicial interpretations of that history, [establish] that Congress, in enacting a statute primarily intended to deal with the conflict between state regulation of insurers and the federal antitrust laws, had no intention of declaring that subsequently enacted civil rights legislation would be inapplicable to any and all of the activities of an insurance company that can be classified as 'the business of insurance'" (Pet. App. 18a). In any event, the court concluded, Section 708 of Title VII explicitly pre-empted state law to the extent it approved of TIAA-CREF's discriminatory system (Pet. App. 19a).

Finally, the court approved and extended to TIAA the district court's grant of injunctive relief precluding CREF from using sex distinct mortality tables in calculating periodic retirement benefits for persons who retire on or after May 1, 1980. It also approved the relief awarded against Long Island University. The court based its approval on, *inter alia*, the facts

that "[t]he equalization of the amount of monthly payments to be received by similarly-situated male and female employees can be calculated so as not to change the total anticipated obligations of the funds" (Pet. App. 24a); that the alteration in the amount of future benefits will not alter any settled expectations of male participants and will likely reduce the benefits of only 40% of future male retirees by 1% to 8% (Pet. App. 26a & n.12); and that this Court's decision in *Manhart*, as well as other judicial decisions, put TIAA-CREF on notice that their practices with respect to calculating retirement benefits were illegal (Pet. App. 22a-23a).

3. The Sixth Circuit Court of Appeals, on essentially the same facts, has reached a conclusion directly contrary to that of the court below. *Peters v. Wayne State University*, 691 F. 2d 235 (1982), petition for cert. pending, No. 82-794.<sup>7</sup> There, the court of appeals rejected, as "clearly erroneous," the district court's conclusion that TIAA-CREF were employers. It relied, *inter alia*, on the fact that "Wayne State cannot control Teachers Annuity's administrative policies once its employees decide to join the Teachers Annuity Plan" and that "the decision to use sex-segregated mortality tables to compute annuity payments was Teachers Annuity's alone" (Pet. App. 139a). Citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the court held that Wayne State University had not engaged in sex

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<sup>7</sup> The Wayne State University—TIAA-CREF retirement plan did not mandate employee participation, although employees who decline to participate forfeit the employer contribution. The court of appeals' decision in *Peters* is reproduced at Pet. App. 136a-145a. Further references to that decision will accordingly be to that document.

discrimination by selecting the facially discriminatory plan, because plaintiffs did not demonstrate that the university's "motivation was discriminatory or improper in any way" (Pet. App. 141a). The court distinguished this Court's decision in *Manhart*, *supra*, because *Manhart* involved "unequal contributions to an employer-operated pension fund" (Pet. App. 143a; emphasis in original). It then held that the use of sex-segregated actuarial tables resulting in unequal benefits was justified because men as a class received a benefit package equal to the package received by women as a class (Pet. App. 140a), and because the plan's payment differences were based upon longevity and not sex (Pet. App. 145a).

4. On October 12, 1982, this Court granted certiorari in *Arizona Governing Committee v. Norris*, No. 82-52, which involves a voluntary deferred compensation plan offered to its employees by the State of Arizona, in which employees may select among a variety of payout options available from private organizations the State has selected to participate in the plan. Those options include life annuities offered by a number of these organizations, which all use sex-based mortality tables. Accordingly, the monthly annuities available to female employees are smaller than to males who have deferred the same amount of income. Arizona claims that its plan does not violate Title VII, and also objects to the relief awarded (82-52 Pet.).

## ARGUMENT

Petitioners in No. 82-791 correctly contend that the decision below is in direct conflict with that of the Sixth Circuit in *Peters v. Wayne State University, supra*, and that the questions presented are important ones in which a uniform national rule is appropriate and which accordingly warrant review by this Court.<sup>6</sup>

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<sup>6</sup> We do not, however, agree that the fourth question petitioners in No. 82-791 present warrants plenary review. That question—whether proof of discriminatory intent in the use of sex based mortality tables is necessary to prove a Title VII violation—was not discussed by the court of appeals in this case, and we submit that it is clear that proof of invidious intent is unnecessary where, as here, the employment benefits available to employees are explicitly differentiated on the basis of sex. See *Los Angeles Department of Water & Power v. Manhart, supra*, 435 U.S. at 712-713. In such circumstances, there is no need, as there was in *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and the other cases on which petitioners rely (Pet. 21), to determine whether such differences in treatment are based on gender or on some appropriate business reason. Intentional gender based distinctions, not justified as a bona fide occupational qualification, violate Title VII regardless of the employer's subjective motivation. Remarks of Sen. Humphrey, 110 Cong. Rec. 12724 (1964); Remarks of Sen. Dirksen, 110 Cong. Rec. 8194 (1964); *Robinson v. Lorillard Corp.*, 444 F.2d 791, 796 (4th Cir. 1971); *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 996 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1201 (7th Cir. 1971); *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972); *Jones v. Lee Way Motor Freight, Inc.*, 431 F.2d 245, 250 (10th Cir. 1970); *Weeks v. Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969); *Kober v. Westinghouse Electric Corp.*, 480 F.2d 240 (3d Cir. 1973); *Manning v. General Motors Corp.*, 466 F.2d 812 (6th Cir. 1972); *Williams v. General Foods Corp.*, 492 F.2d 399 (7th Cir. 1974); *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971).

1. On the question of liability, we submit that the courts below correctly concluded that the use of sex-segregated actuarial tables to calculate employees' retirement benefits is unlawful under Title VII. In *Los Angeles Department of Water & Power v. Manhart*, *supra*, this Court held that a retirement plan that required women to contribute more than similarly situated men, because women as a class live longer than men, violated Section 703(a)(1) of Title VII (42 U.S.C. 2000e-2(a)(1)). The LIU plan at issue here is based on precisely the same rationale and operates in the same manner—on the basis of sex-segregated life expectancy tables—as the plan in *Manhart*. As the court of appeals concluded, there is no meaningful distinction between this plan and the disparate treatment accorded female employees in *Manhart*. Whether a woman contributes a greater amount of her compensation than a man for an equal benefit or contributes an equal amount for a lesser benefit, the use of sex based actuarial tables in calculating periodic benefits results in the same discrimination.

Reliance on “actuarial principles”—specifically, the assertion that “[b]ecause the group of women live more years than similarly situated men \* \* \* lifetime annuity benefits must be paid at a lower periodic rate to the women” (82-791 Pet. 5)—as justification for their disparate treatment was expressly rejected in *Manhart* (435 U.S. at 710, footnotes omitted):

[T]here is no reason to believe that Congress intended a special definition of discrimination in the context of employee group insurance coverage. It is true that insurance is concerned with events that are individually unpredictable, but that is

characteristic of many employment decisions. Individual risks, like individual performance, may not be predicted by resort to classifications prescribed by Title VII. \* \* \* [W]hen insurance risks are grouped, the better risks always subsidize the poorer risks. Healthy persons subsidize medical benefits for the less healthy; unmarried workers subsidize the pensions of married workers \* \* \*. Treating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair. To insure the flabby and the fit as though they were equivalent risks may be more common than treating men and women alike; but nothing more than habit makes one "subsidy" seem less fair than the other.

Last Term, the Court again emphasized that "the principal focus of [Title VII] is the protection of the individual employee" (*Connecticut v. Teal*, No. 80-2147 (June 21, 1982), slip op. at 13), and explained *Manhart* as holding that "fairness to the class of women employees as a whole could not justify unfairness to the individual female employee" (*id.* at 14). Petitioners in *Teal* contended that Title VII is not violated, despite a showing that a facially neutral policy has a discriminatory impact on certain employees, if it is also shown that the policy is administered in a way that results in a racially neutral work force (slip op. 12). The Court rejected this "bottom line" defense: because Title VII protects individuals, not groups, it is not satisfied simply by a showing that the challenged policy is fair to the group as a whole (slip op. 13-14). Petitioners here, and the court of appeals in *Peters*, offer the same "bottom line" defense rejected in *Teal*, in an attempt to justify a facially discriminatory policy. But it follows a

fortiori from *Teal* that where the challenged policy is facially discriminatory rather than neutral (in other words, where the case is one of discriminatory treatment rather than discriminatory impact), it cannot be justified by showing that the class as a whole has nevertheless been fairly treated (*Teal* slip op. at 14-15). It is simply irrelevant for Title VII purposes that women as a group receive total annuity benefits equal to men as a group. The violation consists of the payment to each individual woman of smaller monthly benefits than are paid to a similarly situated man. *Teal* teaches that that violation cannot be justified by reliance on the treatment of other members of the victim's class, either individually or as a group.<sup>9</sup>

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<sup>9</sup> TIAA-CREF also assert, without explaining their rationale, that because employee contributions are credited to individual accounts, their plans are outside the scope of *Manhart* (Pet. 15-16 & n.6). The fact that prior to the date of retirement, TIAA and CREF maintain individual accounts for employees participating in their plans does not mean that funds cannot be converted into annuities on a sex-neutral basis, or that *Teal*, and *Manhart's* discussion of group insurance practices, are inapplicable to TIAA and CREF plans. Although contributions paid by or on behalf of employees who have not yet retired, as well as pre-retirement dividends, are credited to individual accounts, at no time before or after retirement can any participant withdraw these funds. Moreover, the record reveals that those individual accounts disappear once an employee retires. At the date of retirement, an employee "settles" his contract with TIAA and CREF and receives a promise of future annuity payments (J.A. 177). Thus, all funds paid by or on behalf of employees as well as all investment earnings attributable to their contributions become part of a common pool that is used for further investment and payment of annuity benefits. Accordingly, retired employees with short lives will subsidize retired employees with longer lives, regardless of the sex of the particular indi-

2. The court of appeals below acknowledged that respondent Spirt "is not an employee of TIAA-CREF in any commonly understood sense" (Pet. App. 14a). But because TIAA and CREF exist "solely for the purpose of enabling universities to delegate their responsibility to provide retirement benefits for their employees," and participation in their programs is mandatory for tenured faculty members at LIU, the courts below ruled that TIAA and CREF should be viewed as employers within the meaning of Title VII (*ibid.*).<sup>10</sup> In addition, the court of appeals ruled that educational institutions had, in effect, delegated to TIAA and CREF their responsibilities as employers to provide retirement plans (Pet. App. 14a-15a).

The Sixth Circuit in *Peters*, by contrast, ruled that TIAA and CREF were not employers because their responsibility is limited to management of the retirement funds and disbursement of individual annuities

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viduals in either group. *Manhart's* group insurance discussion is therefore, like *Teal*, fully applicable to the TIAA and CREF plans.

<sup>10</sup> The court of appeals adopted the proposition that the term "employer" in Title VII "is sufficiently broad to encompass any party who significantly affects access of any individual to employment opportunities, regardless of whether that party may technically be described as an 'employer' of an aggrieved individual as that term has generally been defined at common law" (Pet. App. 14a). That standard could be read to extend Title VII to the admissions policies of educational institutions and the membership policies of private clubs and other institutions clearly not intended to be covered by Title VII. Reliance on the broad proposition is not necessary to the decisions of the courts below. In any event, the statutory definition of the term employer would, in light of the conflict in the circuits, appropriately be an issue for this Court ultimately to resolve.

(Pet. App. 139a). They were not agents of the educational institutions, the Sixth Circuit held, because those educational institutions did not, and could not, control them; the decision to use sex based tables was solely that of TIAA and CREF (*ibid.*). For those reasons, the Sixth Circuit reversed as "clearly erroneous" the district court's holding that they were employers (*ibid.*).

More than 400,000 employees of approximately 2800 colleges and universities participate in the TIAA-CREF system (Pet. App. 3a). Although the conflict between the Sixth Circuit and the Second Circuit as to whether TIAA and CREF should be considered employers or agents of employers within the meaning of Title VII is in part based upon facts peculiar to TIAA and CREF, the conflict between the circuits affects the rights and liabilities of the many employees of educational institutions, and it is sufficiently important to warrant review by this Court.

The issue of whether TIAA and CREF are employers covered by Title VII, however, is concededly separate from the question of liability, because in this case the educational institution (Long Island University) is a party to the suit and a petitioner in this Court (No. 82-913), and can be held liable for any violation of Title VII. TIAA and CREF are properly before the courts as parties necessary for relief under Rule 19, Fed. R. Civ. P., even if they are not employers. If liability under Title VII is sustained, however, the question whether TIAA and CREF are employers or agents of employers within the meaning of Title VII is significant in determining the rights and obligations of the parties, as to matters of monetary liability and liability for attorney's fees, and may also be of practical significance in fashioning prospective relief.

3. If TIAA and CREF are employers within the meaning of Title VII, there remains the question whether the McCarran-Ferguson Act is a "defense" to any Title VII liability which might otherwise be imposed. There is no conflict between the circuits on this question, and standing alone the issue might not warrant review by this Court in the absence of a conflict. TIAA and CREF have raised the issue in their petition, however. If the Court agrees that the conflict in the circuits on the other questions presented warrants review, it may wish to grant review on this issue as well, in order to resolve the whole controversy here.

4. There remains the question whether the relief ordered in this case was appropriate. This Court recognized in *Manhart, supra*, 435 U.S. at 721, the special problems inherent in formulating appropriate relief in this area because of the "potential impact which changes in rules affecting insurance and pension plans may have on the economy \* \* \* [by creating] major unforeseen contingencies [that] jeopardize[] the insurer's solvency and, ultimately, the insureds' benefits." These very concerns—the need to insure financial integrity of retirement systems and the desire to protect the interests of employees and their beneficiaries—led to the passage of the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, which requires covered plans to conform to specified minimum standards.<sup>11</sup> Both the statutory

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<sup>11</sup> Title I of ERISA applies generally to pension plans established or maintained by employers or unions engaged in or affecting interstate commerce (29 U.S.C. 1003(a)). Title II of ERISA, and subchapter D of chapter 1 of the Internal Revenue Code (26 U.S.C. (& Supp. V) 401-415), contain standards to qualify pension, profit-sharing and stock bonus

language of ERISA and its legislative history demonstrates that Title VII applies to ERISA plans.<sup>12</sup>

plans for favorable tax treatment. Those standards are substantially identical to the ones in Title I.

The plan involved in *Norris* is a "governmental plan" exempt from coverage under Title I of ERISA. See Section 4(b)(1), 29 U.S.C. 1003(b)(1); Section 3(32), 29 U.S.C. 1002(32). Title II is also inapplicable to such plans because their tax status is generally governed by either Section 457 of the Internal Revenue Code (26 U.S.C. (Supp. V)) or by the provisions of that Code that were in effect before the passage of ERISA (26 U.S.C. 410(c)(2), 411(e)(2)).

While the question was not developed in the courts below, the plan involved in this case appears to be a "pension plan" for purposes of Title I, but not for Title II, of ERISA. This case involves retirement income arrangements sometimes referred to as "tax-sheltered annuities" or "section 403(b) annuities." These are annuity contracts purchased by employers for individuals who work for either public schools (including colleges and universities) or certain tax-exempt organizations. Within limits, the amounts contributed by the employer for such contracts are not taxable to the employee. Such arrangements are not subject to the requirements applicable to "qualified" pension, profit-sharing, and stock bonus plans under Section 401(a) of the Internal Revenue Code of 1954 (26 U.S.C. (& Supp. V)). Since there is no trust corpus, there is no "plan" within the meaning of the Code. However, such an arrangement is considered a "pension plan" for purposes of Title I of ERISA if it is maintained by an employer, an employee organization or both (and is not otherwise excluded from coverage). A Department of Labor regulation (29 C.F.R. 2510.3-2(f)) states that certain tax-sheltered annuity arrangements are not maintained by an employer if all of a fairly lengthy list of requirements are satisfied, including the requirement that participation be completely voluntary (the LIU plan, by contrast, is mandatory for tenured faculty members).

<sup>12</sup> Section 514(d) of ERISA, 29 U.S.C. 1144(d), provides that nothing in ERISA "shall be construed to alter, amend,

In reconciling the policies and requirements of ERISA and the concerns noted in *Manhart* with the need to provide effective relief for Title VII violations, four principal remedial approaches are conceivable: (1) an order that the benefits of future retirees be calculated from sex-neutral actuarial tables; (2) an order that the benefit level of the disfavored class be raised to that of the favored class ("topping up"); (3) a hybrid order, requiring the use of sex-neutral tables to calculate benefits attributable to future contributions, and "topping up" for benefits attributable to past contributions; and (4) an order requiring the use of sex-neutral tables only for benefits accruing after the date of the order.<sup>13</sup>

The relief awarded in this case against petitioner LIU appears to be a variant of category (4) above—the least extensive of the four categories of relief. There is, accordingly, no substantial basis for contending that it was excessive, and indeed petitioner LIU makes no such contention. If this Court con-

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modify, invalidate, impair, or supersede any law of the United States \* \* \* or any rule or regulation issued under any such law."

In both the Senate and the House there was discussion of amending ERISA to include a provision prohibiting sex-based discrimination in pensions. The proponents of the amendments agreed on the floor not to offer them because both Senator Williams and Representative Dent (the floor managers) gave express assurances that Title VII already prohibited discrimination in pension benefits, citing previously decided Title VII cases. 119 Cong. Rec. 30409-30410 (1973); 120 Cong. Rec. 4726 (1974). The fact that Congress determined that Title VII applies to ERISA plans, however, does not suggest that Title VII relief may not be fashioned taking into account ERISA concerns.

<sup>13</sup> The options involving "topping up" could have a significant financial impact on pension plans.

cludes that it was also proper to award relief against TIAA or CREF (see pages 16-18, *supra*) it will be necessary as well to consider the propriety of the relief ordered against them (a somewhat more extensive form of relief than that awarded against LIU).<sup>14</sup>

### CONCLUSION

Two issues presented by this case—the applicability of Title VII to sex-based actuarial tables and the question whether TIAA-CREF are employers covered by that Title—are worthy of review by this Court. *Norris* raises the liability issue (in a somewhat different context), but not the employer issue. For that reason the Court may wish to hold this case until *Norris* has been decided and then, to the extent necessary, grant certiorari in this case to decide the remaining issues not disposed of in *Norris*.

Respectfully submitted.

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JANUARY 1983

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<sup>14</sup> The EEOC, which supported the relief awarded against TIAA-CREF in the courts below, adheres to the position that that relief was proper under Title VII.